

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

754 FEDERAL COURTS BUILDING

ST. PAUL, MINNESOTA 55101

PAUL A. MAGNUSON

JUDGE

US EPA RECORDS CENTER REGION 5



515152

November 5, 1984

To Counsel of Record in United States of America, et al, v.  
Reilly Tar & Chemical, et al  
Civil File No. 4-80-469

Dear Counsel:

Enclosed is an unsigned Case Management Order which the court would like to discuss at the pretrial conference on November 8, 1984.

The Order has been drafted in anticipation of the appointment of a Special Master. Mr. Hird's letter of September 28, 1984 indicated that a decision from the Department of Justice in regard to funding for the Special Master was imminent. Mr. Shakman advised the court in his letter of October 1, 1984 that he would seek approval for such funding from the Minnesota Pollution Control Agency Board in late October or November. The court has not heard from either Mr. Hird or Mr. Shakman as to the current status of this issue. The court will expect to be apprised on November 8, 1984 as to this matter so that the Case Management Order may be signed shortly thereafter.

The draft Order has altered the stipulated dates in paragraphs 7, 8 and 9 in light of the fact that the agreed to dates have passed. Apparently, ground water models were exchanged on October 30, 1984 as agreed in paragraph 8.

As to those matters in paragraphs 6, 12, 20 and 21 to which the parties were unable to agree, the court will invite brief comment to the court's resolutions during the pretrial conference.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Paul A. Magnuson".

Paul A. Magnuson

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

United States of America,

Civil File No. 4-80-469

Plaintiff,

and

State of Minnesota, by its  
Attorney General Hubert H.  
Humphrey, III, its Department  
of Health, and its Pollution  
Control Agency,

Plaintiff-Intervenor,

v.

CASE MANAGEMENT ORDER

Reilly Tar & Chemical Corpor-  
ation; Housing and Redevelopment  
Authority of St. Louis Park; Oak  
Park Village Associates, Rustic  
Oaks Condominium, Inc., and  
Philip's Investment Co.,

Defendants,

and

City of St. Louis Park,

Plaintiff-Intervenor,

v.

Reilly Tar & Chemical Corpor-  
ation,

Defendant,

and

City of Hopkins,

Plaintiff-Intervenor,

v.

Reilly Tar & Chemical Corporation,

Defendant.

The court held a pretrial conference in this matter on September 19, 1984, at which the court and counsel have discussed many of the problems which have prevented the completion of pretrial discovery. Pursuant to the request of the court, the parties have submitted their written positions with respect to the entry of a case management order. Upon the basis of these submissions, the court being duly advised,

**IT IS ORDERED:**

1. The trial of this action is bifurcated into two phases. Phase I, which shall be tried first, shall determine (a) whether the defendant Reilly Tar & Chemical Corporation ("Reilly") is liable to the plaintiffs and plaintiff-intervenors (hereinafter grouped as "plaintiffs") under section 7003 of RCRA, 42 U.S.C. § 6973, and under sections 106 and 107 of CERCLA, 42 U.S.C. § 9606-9607, and (b) all remedial measures which are necessary and appropriate under section 104 or 106 of CERCLA, the National Contingency Plan, or any other law. Reilly's defense of the unconstitutionality of these statutes shall also be determined. Reilly's laches defense to the United States' claims and Reilly's several defenses to the plaintiff-intervenors' claims shall be reserved to Phase II.

Phase II, which will be tried at a later date to be designated by the court after the trial of Phase I, will relate to all other issues between the parties, including (1) claims for reimbursement of costs, (2) claims for natural resource damages, and (3) issues arising only between Reilly and the intervening plaintiffs. Except as provided in paragraph 2 hereof, and as to

claims for contribution from other parties, issues tried in Phase I shall not be relitigated in Phase II. This order is without prejudice to any parties' right to move for a further severance or other relief with respect to the issues in Phase II, after the conclusion of Phase I.

2. Because Reilly has demanded a jury trial, and the court makes the following orders to protect the right to jury trial guaranteed by the Seventh Amendment to the United States Constitution.

- (a) all issues in Phase I will be tried by the court without a jury;
- (b) the court's findings in Phase I shall not be binding against any party with respect to issues in Phase II on which that party has a constitutional right to a jury trial, and with respect to which a jury trial has been demanded.

3. Following the completion of the trial on Phase II, the court may modify its judgment on Phase I in any manner deemed to be equitable and appropriate based on evidence received in Phase II. Reilly's implementation of any portion of the remedy prior to Phase II shall not be deemed a waiver of its defenses not determined in Phase I.

4. Discovery as provided herein shall proceed upon all Phase I issues. Discovery on Phase II issues is stayed pending the further order of the court, except as to depositions necessary to preserve testimony which are approved by the Special

Master appointed hereunder. This order is without prejudice to the right of the City of St. Louis Park to petition the court for responses to any requests for admission presently on appeal. This order shall govern Phase I discovery.

5. Some of the expert witnesses have been retained by the parties prior to October 1, 1984; however, it is contemplated that additional expert witnesses may be retained by them. Such experts will be referred to in this stipulated order as "retained" experts and "additional" experts, respectively.

6. All parties shall serve copies of the reports of their retained experts (or a fair summary of their expected testimony) by November 30, 1984. These reports shall set forth in detail the subject matter upon which the expert is expected to testify, and shall include the substance of the facts and opinions to which the expert is expected to testify and the grounds for each opinion. In addition, the report shall designate all published and unpublished reports, studies and information relied upon. Reports, studies and information not previously produced shall be produced upon request if they are not reasonably accessible to the opposing party and the burden of production is not unreasonable.

Illustrative exhibits to be used by expert witnesses at trial must be furnished to opposing counsel no later than thirty (30) days prior to trial.

7. On or before November 13, 1984, the parties shall exchange the following documents in their custody or control or control of their experts which pertain to wells or soil borings located on the Reilly site, or wells or soil borings studied in order to assess the pollution ascribed to the Reilly operations, or studied in order to assess other possible sources of ground water pollution in the St. Louis Park area:

- (a) all chemical and physical analyses of samples of soil and water, including all data on such analyses stored on computer at the Land Management Information Center of the State of Minnesota and in the Reilly-ERT computer data base, but not including the litigation computer of either party;
- (b) protocols and quality assurance/quality control procedures used for the collection, handling, storage, sampling and analyses; and
- (c) water level measurements, stratigraphic log(s) and construction materials.

Best efforts shall be made by the parties receiving these documents to work with the producing party to avoid repeat production of documents already produced. Hereafter, each party which proposes to take additional samples from the site or from other locations in St. Louis Park will give one week's notice of such intent to each other party who has, or is taking samples, and the other parties shall have the opportunity to split grab

samples and to split other samples where feasible. The parties shall exchange protocols used in such sampling and analyses, and shall exchange the results of the analyses.

8. On or before November 13, 1984, the parties shall exchange ground water models including results and procedures used.

9. All written interrogatories and requests for production relating to Phase I shall be served no later than November 13, 1984, and responses thereto shall be served by December 21, 1984.

10. Each party shall serve upon opposing parties by December 14, 1984, a list of all documents withheld from production prior to May 1, 1984, on the ground of privilege. Documents subsequently withheld on the basis of privilege shall be listed by January 8, 1985. Direct or indirect communications between counsel, and the expert witnesses, and communications occurring during the pendency of this action and the amended state court action subsequent to April 1, 1978, between co-counsel and between counsel and their clients or their legal staff, need not be produced or listed.

11. All motions to compel the production of documents concerning Phase I discovery shall be filed by January 26, 1985, and shall be heard by the Special Master appointed hereunder. Prior to filing such a motion, a party seeking to compel the production of documents shall meet with the opposing party in an attempt to resolve the parties' differences concerning the documents sought to be produced.

12. Oral depositions of retained experts and other oral depositions related to Phase I may commence December 17, 1984. The parties shall confer and attempt to reach agreement upon a schedule of oral depositions. Best efforts shall be made to see that the sequence of such experts' depositions shall alternate between plaintiffs' experts and defendant's experts, commencing with a plaintiffs' expert. The schedule will be established and discovery shall proceed, so that neither side shall preempt a disproportionate portion of the discovery procedure. Each party shall bear the cost of its own experts at this stage of the proceeding.

13. All "additional" experts shall be retained or assigned, and a report or summary of the testimony of such experts shall be furnished to opposing counsel on or before December 31, 1984.

14. All requests for admission of fact or authenticity of documents shall be served by February 1, 1985.

15. All fact witnesses to be called by any party relative to Phase I shall be identified and a summary of their expected testimony served upon opposing counsel by January 14, 1985.

16. Depositions of "additional" experts whose identity was disclosed on or before December 31, 1984, may commence January 8, 1985.



17. All discovery regarding Phase I including responses to discovery and filing of motions to compel shall be completed by March 22, 1985. Notwithstanding the prior sentence, motions to compel deposition testimony may be filed up to ten (10) days after conclusion of the deposition.

18. Each party who has furnished a final report of an expert may, on or before April 3, 1985, serve a supplemental expert's report explaining newly obtained data or responding to the other parties' final reports or containing a critique or rebuttal of the other reports in a manner reasonably apprising the adverse parties of the expert's opinion regarding the adequacy, appropriateness or correctness of the adversary's final report.

All analytical data to be introduced at trial shall be listed by the party intending to introduce it and such list shall be served upon the other parties who have been involved in the sampling by April 3, 1985. The parties will meet to discuss objections to the data prior to the final pretrial conference.

Upon the trial of this matter, the court will determine whether to admit exhibits or testimony which were not disclosed through reports, supplemental reports, or depositions based upon the circumstances established for any failure to make a full disclosure. Due regard will be given to the problems of trial counsel in preparing for the trial of a case of this magnitude, but deliberate failure to disclose will result in the rejection of the evidence.

19. A status conference will be held before this court at 8:30 a.m. on November 8, 1984, and a final pretrial conference will be held on April 10, 1985. Unless otherwise ordered, trial of Phase I shall commence on April 29, 1985. Before the date of the final pretrial conference, the parties shall serve and file (a) proposed findings of fact and conclusions of law, (b) memoranda of contentions of fact and law, (c) designations of portions of depositions to be read, (d) final lists of fact witnesses and expert witnesses, (e) lists of exhibits, premarked by the party offering them, and (f) motions in limine. Counsel shall meet following the pretrial conference to discuss additional objections to exhibits. Objections shall be filed no later than five days prior to trial.

20. To expedite and promote the possibility of settlement and to rule on all non-dispositive motions made after the date of this order, \_\_\_\_\_ is appointed pursuant to Fed. R. Civ. P. 53. He shall be compensated for his services at the rate of \$ \_\_\_\_\_ per hour. Compensation for the Special Master shall be paid as follows: two-thirds shall be paid by the United States, the State of Minnesota, and the City of St. Louis Park, and one-third shall be paid by Reilly. Such compensation shall not be recoverable as a taxable cost or otherwise.

21. No discovery request not timely served under this order may be served without leave of the court or Special Master, and no motion for summary judgment or dismissal may be filed prior to the completion of discovery as to Phase I without leave of court.

22. Any opposed application for an extension of the foregoing deadlines must be in writing and served upon counsel for each party having an interest in the extension. Any opposed application must disclose (a) the precise relief sought, (b) a good cause for such extension, and (c) a statement regarding the positions of counsel for other interested parties regarding the application.

Dated: November \_\_\_\_\_, 1984.

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Paul A. Magnuson  
United States District Judge